Supreme Court, U.S.
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(2)

No. 93-1910

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

KENDALL H. BREEDLOVE,

Petitioner

v.

CALVIN W. PHILLIPS, et. al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT JOYCE E. HORTON

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied due process and/or equal protection of the laws by a decision of a trial court so as to entitle him to a Writ of Certiorari when the decision of that trial court that was not timely appealed under the provisions of the Code of Virginia and the rules of the Supreme Court of Virginia?

2. Is the Petitioner entitled to a Writ of Certiorari from the Supreme Court of the United States on issues not presented in his Notice of Appeal filed in the Supreme Court of Virginia?

3. Is the Petitioner entitled to a Writ of Certiorari when the Virginia Supreme Court has not decided any question of federal law in a way that conflicts with the applicable decisions of the Supreme Court of the United States or the highest courts of other states?

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LIST OF PARTIES TO THIS PROCEEDING

1. Petitioner: Kendall H. Breedlove

Respondents: Calvin W. Phillips

Joyce E. Horton

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BRIEF IN OPPOSITION OF
RESPONDENT JOYCE E. HORTON

COMES NOW the Respondent Joyce E. Horton, by counsel, and respectfully prays that this Honorable Court deny the Petitioner's Petition For Writ of Certiorari for the reasons stated below.

STATEMENT OF THE CASE

Respondent Joyce E. Horton first takes exception to the list of parties set forth in The Petition For Writ Of

Certiorari to the extent that James H. Horton is named as a party to this proceeding. As stated in the Petition, this case arises out of an action brought by Petitioner in the Circuit Court of Fairfax County, Virginia (At Law No. 117967) in twelve counts; ten counts sounding in defamation and two counts sounding in civil conspiracy. James H. Horton, the husband of respondent Joyce E. Horton was named as a party defendant only in the conspiracy counts, but not in the defamation counts.

By order of October 30, 1992, the trial court dismissed the ten defamation counts on demurrer of the defendants without leave to amend and dismissed the two conspiracy counts with leave to amend. Petitioner subsequently filed an amended Motion For Judgment amplifying the two conspiracy counts. Petitioner voluntarily

nonsuited the two conspiracy counts in Amended Motion For Judgment by order dated July 16, 1993 (Petition For Writ Of Certiorari at p. 8, ¶ 14). Petitioner's application for a writ seeks review of the decision of the trial court in dismissing the ten defamation counts on demurrer. Accordingly, James H. Horton is not a party to this proceeding.

Respondent Horton takes exception to the characterizations contained in the Petition For Writ of Certiorari as false, etc. Respondent also takes exception to the Petitioner's position that he submitted any evidence in the case from which this appeal arises as stated in the Petition at p. 6, ¶ 8. The case below was decided upon demurrer and no evidence was taken.

Petitioner also refers to certain decisions of the Arlington County Circuit

Court as res judicata. Those decisions are not res judicata in this matter as there is neither an identity of the parties with those in this action nor an identity of causes of action.

Lastly, Respondent would direct the Court's attention to the Petitioner's admission at P. 10, ¶ 22 of the Petition wherein it is stated that Petitioner filed his Notice of Appeal from the "letter ruling" of the trial court on July 19, 1993 and to Petitioner's admission of the entry of the Final Order by the trial court on September 17, 1993 (Petitioner's Exhibit 3, p. A6).

SUMMARY OF ARGUMENT:

(1) Petitioner's appeal was premature.

The Petition should be dismissed because the appeal from the decision of the trial court to the Supreme Court of

Virginia was premature and was not timely.

Petitioner filed his Notice of Appeal on July 19, 1993, almost one month before the actual date of entry of the Final Order, September 17, 1994. Since the trial court speaks only through its orders, and not through letters advising the litigants of the opinion of the trial judge, there was no appealable final order existing on July 19, 1993.

(2) The Petition contains new matter not included in the appeal below.

The appeal below arose from the denial of the Petitioner's Petition To Rehear in the trial court (excerpted in Petitioner's Exhibit 13). After the rehearing was denied by the trial court, and after filing and arguing a Petition For Appeal before the Supreme Court of Virginia, Petitioner first raised the constitutional issues of due process and

equal protection in his attempt to gain a rehearing from the Virginia Supreme Court.

(3) There is no conflict among the decisions of the states highest courts.

There is no conflict among the highest courts of Virginia and Missouri and others. Petitioner's argument that Laun v. Union Electric Co. of Missouri, 350 Mo. 572, 166 S.W. 2d 1065 (1942) is in conflict with the Supreme Court of Virginia's decision in Donohoe Construction Co., Inc. v. Mount Vernon Associates, 235 Va. 531, 369 S.E. 2d 857 (1988) is incorrect. Laun is factually distinguishable because in this case, both defendants Phillips and Joyce Horton were alleged by Petitioner to have defamed Petitioner and his property by filing certain mechanic's liens and a "partial release of mechanic's lien".

ARGUMENT

(1) Petitioner's appeal was premature.

Petitioner asserts that the "order" from which he appealed to the Supreme Court of Virginia is the "letter ruling" of the trial judge dated July 5, 1993 (Petitioner's Exhibit 2). This position is erroneous for two reasons: first, a court in Virginia speaks only through its orders, and secondly, the very terms of the "letter ruling", as reproduced by Petitioner, indicates that "Mr. Curran should prepare an appropriate order (emphasis added) reflecting this ruling, and send it to Mr. Breedlove for approval as to form, preserving all objections" (Petitioner's Exhibit 2).

Petitioner filed his Notice of Appeal on July 19, 1993, almost one month before the actual date of entry of the Final Order, September 17, 1994.

Pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia, "the date of entry of any final judgment, order or decree is the date the judgment, order or decree is signed by the judge". Rule 5:1 (b) (13) of the Rules of the Supreme Court of Virginia contains a similar provision, "the 'date of entry' of any final judgment or other appealable order or decree shall be the date the judgment, order, or decree is signed by the Judge".

Further, Rule 5:9 (a) provides that "No appeal shall be allowed unless, within 30 days after the entry of final judgment or other appealable order, counsel for the appellant files with the clerk of the trial court a notice of appeal..." (emphasis added).

It has been frequently held in Virginia that a court speaks only through its orders. Accord: Cunningham v. Smith,

205 Va. 205, 135 S.E.2d 770 (1964); Walker v. Commonwealth, 225 Va. 5, 135 S.E.2d 770 (1983). The Virginia Supreme Court has also distinguished the rendition of a judgment from the entry of that judgment. See: McDowell v. Dye, 193 Va. 390, 69 S.E.2d 459 (1952). It is this distinction that Petitioner's argument implicitly fails to acknowledge. The trial court in this matter made a ruling in letter form, however, no final order was entered by the trial court until September 17, 1993.

Pursuant to Rules 1:1, 5:1 (b) (13) and 5:9 (a) of the Supreme Court of Virginia, the Notice of Appeal filed by Petitioner was premature because there was no final order in existence on July 19, 1993, the date of the filing of the Notice of Appeal. The letter of the Circuit Court Judge is not a "judgment, order or decree" within the contemplation of the

Rules of the Supreme Court of Virginia.

In addition, the plain language of the letter from the trial judge contemplated the preparation and entry of an "order", particularly to protect the Petitioner's right to object thereto. (Please see Petitioner's Exhibit 2).

After the entry of the Final Order of the trial court on September 17, 1993, Petitioner could have noted his appeal, but did not do so. Accordingly, the Supreme Court of Virginia did not err in denying the Petitioner's appeal by its order of January 13, 1994.

Because Petitioner failed to comply with the Rules of the Supreme Court of Virginia in regard to the timely filing of his appeal, he had no absolute right to be heard. Therefore, it follows ipso facto that the denial of his requests for rehearing by the Supreme Court of Virginia

did not deny the Petitioner either due process or equal protection.

The Virginia Code section on rehearing of matters decided by that court, Va. Code §8.01-675.2, provides that rehearing is to be granted only if one of the justices who decided the case adversely certifies that there is good cause for the rehearing.

Petitioner cites the decision of this Court in Coleman v. Thompson, 501 U.S. __, 115 L Ed 2d 640, 111 S Ct 2546 (1991) for the proposition that the action of the Virginia Supreme Court abridged his constitutional right to have his underlying claim heard by a jury. Coleman, however, stands for the principle that this Court

"... will not, review a question of federal law decided by a state court if the decision of that court rests upon a state law ground that is independent of the federal question and adequate to

support the judgment." Id, at 501 U.S.__, 115 L Ed 2d 655, 111 S Ct ___.

Since the decision of the Supreme Court of Virginia was supportable upon a ground independent of the federal questions raised, the Writ should not be granted to review that decision.

(2) The Petition contains new matter not included in the appeal below.

Petitioner first claimed that his constitutional rights were abridged only after denial of his Petition For Appeal by the Virginia Supreme Court. The Virginia Supreme Court, however, accorded Petitioner full due process and access to the courts of Virginia. Petitioner seeks to obtain a review of the merits of his underlying claim in this application for a Writ of Certiorari.

This appeal arises from the refusal of the Supreme Court of Virginia to grant rehearing to Petitioner after denying his Petition For Appeal following oral argument. The underlying appeal was concerned only with the trial court's failure to rehear its decision to dismiss the ten defamation counts without leave to amend.

Following the filing of his appeal, Petitioner was granted oral argument before the Virginia Supreme Court on December 17, 1993 on that matter. After denial by the Virginia Supreme Court of the Petition For Appeal, Petitioner sought rehearing at least twice more from the Virginia Supreme Court. That court, in accordance with its Rule 5:20, considered the petitions for rehearing without argument and denied same.

Petitioner received the process that

was due him and received full access to the courts of Virginia. Further, since Petitioner's appeal was premature and did not appeal from a "final order" as discussed above, Petitioner cannot demonstrate that he had any due process or equal protection right to be heard. Had Petitioner availed himself of an appeal after the entry of the order of the trial court dated September 17, 1993, he would then have been able to argue issues involving both the merits of the underlying claim and issues of constitutional protection.

Petitioner argues that the decision of this Court in Connecticut v. Doehr, 501 U.S. ___, 115 L Ed 2d 1, 111 Sup. Ct. __ (1991) guarantees a hearing before an impartial tribunal before being deprived of a significant property interest and that the mechanic's lien statutes of

Virginia as applied to Petitioner deny him due process (Petition at p. 14, ¶ I(1)(a), et. seq.).

Mechanic's liens, however, are not like the pre-judgment attachment attacked in Doehr, where the person seeking the attachment had no interest in the real property affected. Mechanic's liens are inchoate liens until perfected. This distinction was recognized in the separate opinion in Doehr of Chief Justice Rehnquist and Justice Blackmun, as follows:

> "Materialman's and mechanic's lien statutes award an interest in real property to workers who have contributed their labor, and to suppliers who have furnished material, for the improvement of the real property. ... To require any sort of a contested court hearing or bond before the notice of lien takes effect would largely defeat the purpose of these statutes". Id, at 501 U.S. ___, 115 L Ed 2d 24, 111 Sup. Ct. ___.

The constitutionality of the Virginia mechanic's lien statute was challenged on

due process and equal protection grounds and the statute withstood constitutional scrutiny. See: In Re Thomas A. Cary, Inc. 412 F. Supp 667 (E.D. Va. 1976). Quoting from Spielman-Ford, Inc. v. Hanson's, Inc., 379 F. Supp 997 (D. Ariz. 1973), aff'd 417 U.S. 901, 94 Sup. Ct. 2596, 41 L. Ed 2d 208 (1974), the In Re Thomas A. Cary, Inc. Court noted:

"Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interests of the property owner. The right to alienate has not been harmed, and the difficulties which the lien creates may be ameliorated through the use of bonding or title insurance. Spielman-Ford, supra, at 999."

The Respondent Horton respectfully submits that this Court decline Petitioner's suggestion that the Court review the mechanic's lien statutes of the 50 states and the District of Columbia.

(3) There is no conflict among the decisions of the states' highest courts.

Petitioner argues that the decision of the Missouri Supreme Court in Laun v. Union Electric Co. of Missouri, 350 Mo. 572, 166 S.W. 2d 1065 (1942) is in direct conflict with the decision of the Supreme Court of Virginia in Donohoe Construction Co. v. Mount Vernon Associates, 235 Va. 531, 369 S.E. 2d 857 (1988) justifying the granting of a Writ in this matter. Although Respondent Horton submits that the Court should not grant a Writ in this matter for the reasons set forth above, it is also submitted that there is in fact no conflict between Laun and Donohoe.

Petitioner further suggests that the factual circumstances of the Laun case are virtually identical with those in the underlying controversy and that had the holding of Laun been applied, some or all

of the respondents below may not have been able to take advantage of the privilege.

The Missouri Supreme Court held in Laun that the absolute privilege against defamation accorded to parties to a lawsuit did not apply to other alleged publishers who claimed to be interested in, although not parties to the suit. Id at 582, 1071.

In Donohoe Construction Co, Inc. v. Mount Vernon Associates, 235 Va. 531, 369 S.E.2d 857 (1988), the Supreme Court of Virginia held that the filing of a mechanic's lien constitutes a judicial proceeding entitled to an absolute privilege against an action for slander of title when the statements contained in the memorandum were "relevant and pertinent" to the case. In the present matter, the allegations made against respondent Joyce Horton are that she, acting in her

individual and representative capacities, defamed Petitioner and his property by filing the "partial release of mechanic's lien" (Petition at p. 6, ¶ 8).

Petitioner concedes that the memoranda of lien that are the subject of this case were filed in conformity with § 43-5, Code of Virginia (Petitioner's Exhibit 14 at p. A30), but he attempts to distinguish the holding of Donohoe by suggesting that while the statements contained in the memorandum of mechanic's lien are not protected because those statements were false. In addition to the lack of any evidence in the record of facts to support this contention, Petitioner's interpretation of Donohoe is not supported by a careful reading of that decision.

In Donohoe, the Virginia Supreme Court had ample opportunity based on the

facts before it to find that the amount claimed in the memorandum of lien was false in that a requisition for less than one-half of the amount liened was submitted to Mount Vernon by Donohoe only three days after the filing of the lien memorandum. The trial court had determined that "Donohoe knew or should have known that it was filing its lien improperly". Id at 536. In addition, the record contained documents that "showed that Donohoe had considered filing a lien to prevent closing on permanent financing and to force Mount Vernon into a final settlement" Ibid. Nevertheless, while the lien was found to be invalid, in Donohoe, the Court held that the statements made in the memorandum of mechanic' lien were absolutely privileged.

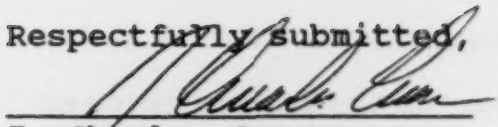
Since respondent Joyce E. Horton was allegedly a party to the filing of a

mechanic's lien and a partial release of mechanic's lien, any privilege that she enjoys under Donohoe, supra is not inconsistent with the holding of Laun, supra.

CONCLUSION

Respondent Joyce E. Horton respectfully prays that this Court deny the application of Petitioner for a Writ of Certiorari on the ground that the Petitioner had no right under the applicable statutes and rules of court of Virginia to have an appeal heard at the time the underlying appeal was held, on the ground that Petitioner has not been denied his rights of due process and equal protection and on the ground that there is no conflict among the highest courts of the states of Virginia and Missouri on the issues in this matter.

Respectfully submitted,



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Certificate of Service

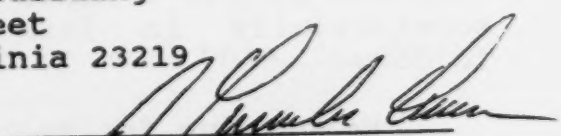
I hereby certify that I mailed three (3) copies of the Brief In Opposition of Respondent Joyce E. Horton by first class mail, postage prepaid, in accordance with Rule 29.3 of the Rules of the Supreme Court of the United States, this 27th day of June, 1994, to:

Mr. Kendall H. Breedlove, Petitioner
2831 Gallows Road
Suite 145
Falls Church, Virginia 22042

Mr. Calvin W. Phillips, Respondent
310 Maple Avenue West
Suite 198
Vienna, Virginia 22180

and pursuant to Rule 29.4 (c) of the Rules of the Supreme Court of the United States, citing that 28 U.S.C. §2403 (b) may be applicable, I mailed three (3) copies by certified mail, postage prepaid, as follows:

The Honorable Stephen D. Rosenthal
Attorney General of the Commonwealth
of Virginia
Supreme Court Building
101 N. 8th Street
Richmond, Virginia 23219



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APPENDIX

Cited Provisions from the Code of Virginia

Virginia Code (1950) §8.01-675.2 Rehearing. -- The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing. However, a notice of petition for rehearing shall be filed as soon as provided by the Rules of Court and the petition for rehearing shall be filed within thirty days after the entry of the judgment with the clerk, who shall note the date of such filling on the order book. The judgment resulting from any such rehearing shall be entered forthwith by the clerk who shall transmit a certified copy thereof to the clerk of the court below, to be entered by him as provided by §8.01-685.

Virginia Code (1950) §43-5. Sufficiency of memorandum and affidavit required by §43-4. -- The memorandum and affidavit required by §43-4 shall be sufficient if substantially in form and effect as follows:

Memorandum for Mechanic's Lien
Claimed by General Contractor.

Name of owner: .....
Address of owner: .....
Name of claimant: .....

Address of claimant: .....
1. Type of materials or services furnished: .....
2. Amount claimed: .....
3. Type of structure on which work done or materials furnished: .....
4. Brief description of property: .....
5. Date from which interest on above amount is claimed: .....
Date:.....

.....
(Name of Claimant)

Affidavit

State of Virginia:
County (or city) of ....., to-wit:

I, _____, (notary or other officer) for the county or city aforesaid, do hereby certify that ..... claimant, or..... agent for claimant, this day made oath before me in my county or (city) aforesaid that .....(the owner) is justly indebted to claimant in the sum of .....(dollars), for the consideration stated in the foregoing Memorandum, and that the same is payable as therein stated.

Given under my hand this ___ day of_ _____, 19__.

.....(Notary Public or Magistrate, et cetera)

Rules of the Supreme Court of Virginia:

Rule 1:1 Finality of Judgments, Orders and Decrees. All final judgments, orders and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated or suspended for twenty-one days after the date of entry and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

Rule 5:1 Scope, Applicability and General Provisions. ...(b) Definitions: (13)
The 'date of entry' of any final judgment or other appealable order or decree shall be the date the judgment, order, or decree is signed by the judge.

Rule 5:9. Notice of Appeal
(a) Timeliness -- No appeal shall be allowed unless, within 30 days after the entry of a final judgment or other appealable order or decree, counsel for the appellant files with the clerk of the trial court a notice of appeal and at the same time mails or delivers a copy of such notice to all opposing counsel.

Rule 5:20. Denial of Appeal: Petition For Rehearing. When a petition for rehearing is denied, the clerk of this Court shall mail a copy of the order denying the appeal to counsel for appellant and counsel for the appellee. Counsel for the appellant may, within 14 days after the date of this notice, file in the office of the clerk of the Court a petition for rehearing not to exceed 15 typed or printed pages in length. The petition shall state that a copy has been mailed or delivered to counsel for the appellee. Eight copies shall be filed. Carbon copies are acceptable. Oral argument on the petition for rehearing will not be allowed. No responsive brief shall be filed unless requested by this Court. The Clerk of this Court shall notify counsel for the appellant and counsel for the appellee of the action taken by this Court on the petition for rehearing.